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POEY YEE MENG & ORS v. TROPIKA ISTIMEWA DEVELOPMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
SU TIANG JOO J
[CIVIL SUIT NO: WA-22NCVC-620-09-2021]
22 JULY 2025

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Abstract – *(i) A claim for liquidated ascertained damages ('LAD') based on an alleged delay in delivering vacant possession of stratified housing accommodation will be rendered unsustainable and time-barred where the claim is based on challenging a Controller of Housing's decision granting an extension of time to the developer, and that decision was made prior to the prospective effect of the Federal Court's ruling in Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals; (ii) There is no prohibition contained in the National Land Code for a registered proprietor of land, which is freehold, to give a lease to a developer the same into housing accommodation subject to the requirements of the Housing Development (Control and Licensing) Act 1966 and its regulations.*

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STRATA PROPERTY: *Claim – Sale and purchase agreement – Delay in delivery of vacant possession – Claim by purchasers for liquidated ascertained damages – Extension of time granted by Controller of Housing – Purchase of leasehold stratified housing parcels in development project – Allegations that sale and purchase agreements in contravention of National Land Code and Strata Titles Act 1985 – Purchasers claimed to have been sold leases instead of freehold titles – Purchasers sought to either have titles converted to freehold status or to return parcels and recovery of full purchase price, interest, and damages – Whether challenge to extension of time must be by way of judicial review – Whether claim time-barred – Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals*

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LAND LAW: *Lease – Leasehold – Sale of leasehold parcel – Parcels held on lease for more than three years – Registration as proprietors with strata titles – Whether in contravention of s. 225(2) of National Land Code*

CIVIL PROCEDURE: *Striking out – Pleadings – Writ and statement of claim – Delay in delivery of vacant possession – Claim by purchasers for liquidated ascertained damages – Whether claim time-barred – Whether claim obviously unsustainable, frivolous or vexatious – Whether abuse of process of court – Whether ought to be struck out*

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By way of separate sale and purchase agreements ('SPAs'), the plaintiffs singly or jointly contracted with the defendants to purchase leases of parcels of stratified housing accommodation in a housing development project ('project'). The project was completed, and the purchase price was paid to the first defendant. Strata titles for the respective parcels had been issued to the plaintiffs. This suit was filed more than four years after vacant possession had been delivered to the plaintiffs. Save for three parcels, this action was commenced approximately eight years after the execution of the SPAs. The plaintiffs' claims were grounded on two causes of action, namely: (i) liquidated ascertained damages ('LAD') claims for delay in delivery of vacant possession of the parcels they purchased; and (ii) that they were sold leases, in contravention of the National Land Code ('NLC') and the Strata Titles Act 1985 ('STA'). The plaintiffs further claimed that the defendants were to execute such instruments as may be relevant to have the plaintiffs registered as proprietors of the parcels they have purchased with freehold status free of any costs and expenses and, in the event this could not be done, they were entitled to return their respective parcels to the defendants on the condition that: (i) the defendants pay to the plaintiffs the entire purchase price, all interest borne by the plaintiffs in securing financing from financial institutions; and (ii) damages computed at 5% of the purchase price of the parcels for those purchasers who have purchased in cash, costs and all incidental expenses, including payments made for the maintenance of the infrastructure and the sinking fund. The second defendant filed encl. 133 to strike out the plaintiffs' amended statement of claim and the re-indorsed writ. The first defendant filed encl. 135 to strike out the plaintiffs' amended writ and amended statement of claim.

Held (allowing encls. 133 and 135; striking out plaintiffs' writ and amended statement of claim):

(1) In view of the Federal Court's decision of *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals* ('*Obata-Ambak*'), the LAD claims by the plaintiffs were without merits for the following reasons: (i) the impugned decision of the Controller of Housing, giving the extension of time in the project from 36 months to 48 months was on 16 July 2013; (ii) in *Obata-Ambak*, it was clarified that the decision in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* ('*Ang Ming Lee*') had only prospective effect which rendered the decision of the Controller of Housing in this case, which was given prior to the decision in *Ang Ming Lee*, to be valid; (iii) it was clearly decided in *Obata-Amba*k that any challenge to the Controller of Housing's decision giving an extension of time or to vary any of the terms in the statutory form, as prescribed in Schedule H of the Housing Development (Control and Licensing)

A Regulations 1989 ('HDR') sound in public law and would have to be challenged by judicial review; (iv) all the plaintiffs were hopelessly out of time to challenge the extension of time granted by the Controller of Housing; (v) the 'second actor theory', elucidated in *Obata-Ambak*, applied squarely in this case as the defendants had gone to secure all the B approvals or endorsements for the project and exemptions from the relevant authorities; and (vi) the limitation of six years for the plaintiffs' causes of action ran from the date of the execution of the SPAs and had set in by the time this action was filed and thus, were time-barred. Thus, the LAD claims by all the plaintiffs had been rendered obviously C unsustainable, frivolous or vexatious in their continued pursuit and were struck out. (paras 39 & 40)

(2) The SPAs clearly provided that the plaintiffs were purchasing leases and they have all taken delivery of vacant possession of their parcels. Despite knowing the legal implications of the Federal Court's decision D in *Obata-Ambak*, the plaintiffs persisted with their LAD claims which could only be grounded upon the SPAs being valid save as to challenging the timeline for delivery of vacant possession. Thus, the plaintiffs, having elected to affirm the validity of the SPAs and had even sought for their purchase of leases to be converted from leasehold to freehold, E were clearly estopped from challenging the validity of the SPAs. For the plaintiffs to seek to have the SPAs declared null and void was an abuse of process and their claims should be struck out. (paras 52 & 53)

(3) Having entered into the SPAs for the purchase of parcels of leases with sub-buildings to be constructed thereon and having paid the purchase F price and taken vacant possession of the same with some of the separate issue documents of strata titles having been issued with the remainder in the process of being issued, what the plaintiffs were now seeking was to ask the court to rewrite the terms of their SPAs. On top of that, the plaintiffs sought the court to order the defendants to execute all relevant G instruments of transfer to register the plaintiffs as registered proprietors of strata titles with freehold status, free of costs and expenses, failing which they want their money back together with interest on their purchase price and financing costs. It was thus apparent that what the plaintiffs were seeking was to utilise the court's process to rewrite the bargain they have made. This was not only frivolous and vexatious but H also an abuse of process. (paras 66-68)

(4) The SPAs were for the sale of parcels with leases of more than three years and they were therefore registrable when the separate strata titles were issued. It was also a fact that for each and every SPA entered into I with two or more persons, the parcels were being held pursuant to an express trust deed declaring themselves to be trustees holding the lease

jointly on trust for each other. There was no contravention of s. 225(2) of the NLC when the strata title was issued and they were registered as trustees. For the plaintiffs to assert otherwise was without merit. (para 79)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Amanah Raya Bhd v. Ong Chin Hoo [2019] 6 CLJ 41 CA ***(refd)***

Ang Beng Tee v. Lee Yit Hoe & Ors [2018] CLJU 1111; [2018] 1 LNS 1111 HC ***(refd)***

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Cheah Theam Kheang v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Co-Operative Central Bank Ltd (In Receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] CLJU 18; [1979] 1 LNS 18 ***(refd)***

Express Newspapers Plc v. News (UK) Ltd & Ors [1990] 3 All ER 376 ***(refd)***

Innab Salil v. Verve Suites Mont Kiara Management Corporation [2020] 10 CLJ 285 FC ***(refd)***

Koperasi Rakyat Bhd v. Harta Empat Sdn Bhd [2000] 3 CLJ 719 FC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja [2000] 3 CLJ 81 FC ***(refd)***

Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor) [2015] 2 CLJ 10 CA ***(refd)***

Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal [2020] 7 CLJ 720 CA ***(refd)***

Nasri v. Mesah [1970] CLJU 85; [1970] 1 LNS 85 FC ***(refd)***

Ng Kong Ling & Anor v. Low Peck Lim & Ors [2017] 5 CLJ 651 FC ***(refd)***

Nor Hazliza Ismail & Anor v. Mohamed Yusoff Shaik Madar [2024] 4 CLJ 353 CA ***(refd)***

Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals [2024] 8 CLJ 519 FC ***(refd)***

Ong Saw Yong & Ors v. Menteri Di Jabatan Perdana Menteri (Parlimen Dan Undang-undang) & Anor [2024] 9 CLJ 265 HC ***(refd)***

Re Bandar Kinrara Properties Sdn Bhd (In Liquidation) [2021] 6 CLJ 599 HC ***(dist)***

Registrar Of Titles, Johore v. Temenggong Securities [1976] CLJU 135; [1976] 1 LNS 135 ***(refd)***

Seaport Worldwide Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2020] CLJU 1442; [2020] LNS 1442 HC ***(refd)***

Tan Kiaw v. Gan Chye Khoon [1983] 1 CLJ 292; [1983] CLJ (Rep) 404 FC ***(refd)***

Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***

The Co-Operative Central Bank Ltd (In Receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(refd)***

Tropika Istimewa Development Sdn Bhd v. Wong Hang Fah & Ors [2025] 8 CLJ 540 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 47, 48, 49, 50, 51

Courts of Judicature Act 1964, ss. 28(1), 68(1)(e), 96(a), (b)

Housing Development (Control and Licensing) Act 1966, s. 24

Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), Schedule H

National Land Code, ss. 5, 214(3), 221(1), (3)(b), 222, 223, 224, 225(2), 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 345(1), 347(3)

Rules of Court 2012, O. 14, O. 18 r. 19(1)(a), (b), (d), O. 33, O. 53 r. 3(6)

Rules of the High Court 1980, O. 14, O. 18 r. 19(1)(a), (b), (d), O. 33

Strata Titles Act 1985, s. 4

For the plaintiffs - Wong Renn Xin; M/s K L Wong

For the 1st defendant - Gregory Vinesh Das & Leah Marie Samuel; M/s Steven Thiru

For the 2nd defendant - Ho Ai Ting & Man Weng Keat; M/s Lee Hishammuddin Allen & Gledhill

For the 3rd-9th, 12th & 13th defendants - Freddy Choy Kay Chun; M/s Shook Lin & Bok

For the 10th & 11th defendants - Koo Yin Soon; M/s Shearn Delamore & Co

For the 14th defendant - Muhammad Azzam Zainal Abidin; SLA

Reported by Lina E

JUDGMENT

Su Tiang Joo J:

Introduction

[1] Upon the applications by both the first ("D1") and the second ("D2") defendants to strike out the plaintiffs' (Ps') action against them, this court had on, 10 June 2025, allowed both their applications. These are the grounds for the decision made.

Relook At The Jurisprudence Of Striking Out Applications

[2] Order 18 r. 19 of the Rules of Court 2012 ("ROC") provides that:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

Position On Striking Out Pre 1 October 2022

[3] The principles on striking out is comprehensively set out in the Court of Appeal authority of *Amanah Raya Bhd v. Ong Chin Hoo* [2019] 6 CLJ 41; [2019] 5 MLRA 24; [2020] 3 MLJ 463. In this case, Nallini Pathmanathan JCA (now FCJ) speaking for the Court of Appeal comprising Tengku Maimun Tuan Mat JCA (then CJ) and Zabariah Mohd Yusoff JCA (now FCJ) said:

[33] When the grounds of judgment of both *Pegasus Engineers* (above) and *See Thong* (above) are properly appreciated, there is no conflict in the propositions they stand for. The proposition in *Pegasus Engineers* (above), despite being made 20 years ago in 1998, still holds water today – that just because there is a right of appeal even from decisions on interlocutory matters, it does not necessarily mean that this right MUST be exercised. And for very good reasons, too. When parties file interlocutory applications and the losing party appeals to the appellate court, this means a delay of the disposal of the full trial or hearing as all parties involved await the outcome of the appellate proceedings.

[34] The case of *See Thong* (above) makes it crystal clear that the combination of various limbs of O. 18 r. 19(1) in one single application should not be deemed to render that application irregular and defective. The Court of Appeal has laid down the guidelines for the order of the various limbs to be considered – first, limb (a) should be considered without having regard to the affidavits, then only the court should proceed to consider the other limbs in light of the affidavit evidence.

[35] However, we need to draw a distinction between the facts of *Pegasus Engineers* (above) where the defendant appealed against the High Court decision to dismiss its striking out application, and the facts of *See Thong* (above) where the plaintiffs appealed against the High Court decision to allow the defendant's striking out application. As clearly enunciated by the learned Court of Appeal Judge in *See Thong* (above), where the court wrongly exercises its power to strike out a claim, the plaintiff would suffer an injustice. The relevant passage in the judgment of Ramly Ali JCA (as he then was) is set out below:

[23] Judges dealing with striking out application under O. 18 r. 19 of the RHC must always bear in mind that the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The

procedure is of a summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of *C C Ng & Brothers Sdn Bhd v. Government of State of Pahang* [1985] CLJ Rep 45; [1985] 1 MLJ 347, had said that "the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution" – Per Seah FJ. It is a power which ought to be very sparingly exercised and only in very exceptional cases, (per Lord Herschell in *Lawrence v. Norrey* – as cited in *C C Ng & Brothers*).

[24] Some judges described the power to strike out the plaintiff's claim as 'draconian' – in the sense that the plaintiff is being deprived completely from having his day in the court of law to establish his claim by adducing evidence and calling of witnesses. If not properly exercised, the court in effect is closing its door for the plaintiff to have his recourse to justice. If the application by the defendant is dismissed, the case will still go for trial and the defendant will still have his second bite of the cherry during trial. On the other hand, if the application is allowed and the case is struck out (as in the present case before us) the plaintiff will obviously lose everything, particularly when the plaintiff cannot refile the claim because of limitation issue.

...

[26] Striking out applications under O. 18 r. 19(1) of the RHC should not be taken lightly by judges. No doubt, the application is recorded as an "interlocutory matter" in the court dockets, but the effect of the striking out is far more serious and drastic compared to the decision after full trial. In full-trial cases, the plaintiff is given full chance and opportunity to establish and prove his claim before the court of law. However, in striking out proceedings, his claim is struck out even before he has the chance and opportunity to prove his case.

[36] We thus conclude the general principle to be gleaned from a reading of both *Pegasus Engineers* (above) and *See Thong* (above) is that *where the High Court dismisses a striking out application, a defendant should give serious consideration whether to appeal or not. After all, the defendant is accorded another opportunity to restate his case which can be fully considered at trial. There are exceptions to this general proposition, for example the legal issue of locus standi in derivative actions where the general case law is not applicable. The reason for this general proposition is to save time and costs.*

[37] However, if the High Court allows a striking out application, the plaintiff cannot be precluded from filing an appeal against that decision. The reason for this is because the plaintiff's action has been summarily struck out and the plaintiff has been deprived of a chance to present his case. The plaintiff should be afforded the opportunity to have the appellate court rectify matters where the High Court has erred in unjustly striking out the plaintiff's claim. (emphasis added)

[4] In *Amanah Raya Bhd*, the High Court dismissed the first defendant's application to strike out the plaintiff's claim pursuant to O. 18 r. 19(1)(a) and or (b) of the ROC. The subject matter of the action was whether the beneficiaries of a deceased estate which has as yet to be fully administered and distributed according to law are entitled to enter into a sale and purchase agreement ("SPA") to sell what they perceived to be their future right to the property belonging to the deceased estate. Upon appeal, the Court of Appeal held that the issue is whether the plaintiff who is the beneficiary had the requisite capacity to contract. The Court of Appeal held this is an issue of law which does not require trial. It went on to consider the law that obtained, and held that the position in law is trite. A letter of administration has to be issued and the property distributed before the beneficiaries can sell the subject land. The net result is that the High Court erred in failing to recognise that the SPA is null and void for lack of capacity. Thus, the plaintiff's action in seeking specific performance of the SPA is obviously unsustainable and ought to have been struck out. Accordingly, the appeal was allowed and the plaintiff's action struck out. In other words, the striking out application succeeded on appeal to the Court of Appeal.

[5] Her Ladyship Nallini Pathmanathan JCA (now FCJ) in *Amanah Raya Bhd* went to set out the following jurisprudence on striking out which merits quoting *in extenso*. Her Ladyship said:

> [56] Since we have determined that the SPA is void, the plaintiff's action in seeking specific performance of the SPA is obviously unsustainable according to the trite principle enunciated in the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, which has been applied in numerous other appellate court cases such as the recent Federal Court case of *Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425 the Court of Appeal in the cases of *OM Cahaya Mineral Asia Bhd v. Damansara Realty (Pahang) Sdn Bhd* [2018] 5 CLJ 587; *Norihan Talib & Ors v. Mohd Nasir Hassan & Ors And Another Appeal* [2018] 2 CLJ 66, *Kalung Makmur Sdn Bhd v. Lo Yen Nyuk* [2018] 1 CLJ 459 and *Datin Paduka Phang Oi Choo v. Tan Sri Datuk G Gnanalingam & Other Appeals* [2017] 5 CLJ 1, to name but a few.
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> [57] In the recent Federal Court case of *Tan Wei Hong* (above), Ramly AH FCJ summarised the applicable principles as follows:
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> > [16] The principle for striking out of pleadings pursuant to O. 18 r. 19 of the ROC is well settled. It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC; *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clard Ltd* [1899] 1 QB 86; *Attorney General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch 274).

A [17] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* (*supra*) are, *inter alia*, as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

B (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the C party has a cause of action or a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and

D (e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[18] The Court of Appeal in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] 1 MLJ 473, had adopted the well-settled principle of striking out in the following passage:

E > *A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration.* It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial, (see; *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565 (Federal F Court).

[19] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* (*supra*) is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', *ie*, the G degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. *If one has to go into a lengthy detailed argument and mature consideration of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial.*

H [58] On this ground, we allowed the appeal. If the SPA is upheld as a valid contract, it would defeat the legislation we have set out above which provides that where a deceased died intestate, only his personal representative may sell the immovable property in the estate, and that too with permission of court. Beneficiaries do not amount to personal I representatives under the PAA 1959 (Revised 1972). If beneficiaries were allowed to sell land of deceased persons who died intestate, it would put

them on the same footing as executors who obtain the power to deal with the deceased's properties from the will. This amounts to circumventing the provision which stipulates that administrators must obtain sanction from court before selling property of the deceased, as beneficiaries would then escape the requirement to take out grant of letters of administration, and to register their status as representatives upon the original issue document of title under s. 346 of the NLC.

[59] As we have discussed above, it is evident from the legislation and case law that the vendors in this case had no legal right to sell the properties in the unadministered estates of Chong Siew Koey and Choong Siew Thean. They should have only executed the SPA after the estates of both deceased persons had been fully administered and the properties distributed to them as beneficiaries. Therefore, the striking out application filed by ARB should be allowed. (emphasis added)

[6] It can be seen that in *Amanah Raya Bhd*, there was an appeal to the Court of Appeal against the High Court's decision of dismissing the striking out application. And, after finding that the matter can be disposed of on an issue of law, it allowed the appeal and allowed the striking out application.

[7] With respect, this is the law on striking out before 1 October 2022.

Post 1 October 2022

[8] On 5 September 2022, the Courts of Judicature ("CJA") (Amendment) Act 2022 was gazetted and the Royal Assent was given on 1 October 2022. In this CJA Amendment Act 2022, amendments were made to s. 68(1) of the CJA on non-appealable matters. Of relevance to this action, the amendments provide that no appeal shall be brought to the Court of Appeal where a High Court dismissed any application to strike out any writ or pleading, see s. 68(1)(e) of the CJA. Similar provisions apply for similar proceedings which originate in the Subordinate Courts. Section 28(1) of the CJA provides as follows:

Civil appeals from subordinate courts

(1) No appeal shall lie to the High Court in any of the following cases:

(a) subject to any other written law, from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law;

(b) where a subordinate court dismissed any application for a summary judgment;

(c) where a subordinate court dismissed any application to strike out any writ or pleading; and

(d) where a subordinate court allowed any application to set aside a judgment in default. (emphasis added)

[9] Thus, with effect from 1 October 2022, an applicant of a striking out application, whether he commenced the action in the High Court or in the Subordinate Courts, has only one opportunity to present his or her case of why the writ or pleading is to be struck out, see *Nor Hazliza Ismail & Anor v. Mohamed Yusoff Shaik Madar* [2024] 4 CLJ 353; [2024] 4 MLJ 770.

[10] If the judge first instance decides that the application is dismissed, there ends the matter and the action is to be set down for trial. The decision cannot be appealed against and corrected on appeal, if necessary, by the Court of Appeal, like what happened in *Amanah Raya Bhd*.

[11] On 19 February 2025, the Court of Appeal dismissed an appeal grounded on the asserted Constitutionality in validity of the two provisions in the Courts of Judicature Act 1964, *to wit*, ss. 28 and 68 (*supra*) that abolished a litigant's right to appeal (see *Ong Saw Yong & Others v. Menteri Di Jabatan Perdana Menteri (Parlimen Dan Undang-Undang) & Anor* [2024] 9 CLJ 265.

[12] Indeed, pre-1 October 2022, an unsuccessful party in a striking out application in the High Court, may subject to leave being granted pursuant to s. 96(a) or (b) of the CJA, even pursue an appeal to the Federal Court. If the application originates in the subordinate courts, the applicant could pursue an appeal up to the Court of Appeal. As the applicants in the following case would testify, despite having had their striking out applications dismissed by the High Court and Court of Appeal, they ultimately succeeded in the Federal Court, see *Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 3 CLJ 81; [2000] 1 MLRA 522; [2000] 3 MLJ 65; [2000] 2 AMR 2119, and *Ng Kong Ling & Anor v. Low Peck Lim & Ors* [2017] 5 CLJ 651; [2017] 4 MLJ 21; [2017] 3 MLRA 419.

[13] Thus, seeing that the applicant has only one opportunity in his striking out application, with respect, in my considered view, it is timely to relook at whether the application should be summarily dismissed just because the issue requires lengthy argument and mature consideration even if it is an issue of law. I opine thus for the following reasons:

(i) judicial time is precious because it is limited and is a scarce resource;

(ii) in terms of proportionality, if a position of law takes more time to consider and upon consideration, the answer can dispose of the action summarily without the need for a trial over many days with many witnesses to be called, surely, this scarce judicial resource would be better used, even if more time is taken to consider the position in law and to determine the same;

(iii) this action is a good example. There are 134 plaintiffs who have entered into 105 sale and purchase agreements ("SPAs") seeking reliefs for liquidated damages for late delivery of the properties purchased by them and for a declaration that their SPAs are illegal, which ultimately is to be decided upon issues of law premised upon facts as pleaded by the plaintiffs;

(iv) even if only 20% of the 134 plaintiffs were to take the witness stand, on a conservative estimate, their trial may take four years or even more as this case will be jostling with other cases in the court's docket to be heard;

(v) therefore, when viewed in totality, even if it takes up to four days to hear arguments on the legal issues and a decision can be taken on the law which if answered in favour of the applicant would see the writ or pleading being struck out, it makes sense to hear the striking out application, even if lengthy arguments and mature consideration is required;

(vi) by analogy in dealing with an application for summary judgment under O. 14 of the Rules of the High Court 1980 (which is reproduced in O. 14 of the ROC) Mohamed Azmi SCJ speaking for the Supreme Court in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLRA 190; [1992] 1 MLJ 400 at p. 408 adopted Lord Diplock's expressed test in *Eng Mee Yong & Ors v. Letchumanan* [1979] CLJU 18; [1979] 1 LNS 18; [1979] 2 MLJ 212:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> *Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is*

A *at first blush of some complexity and therefore takes a little longer to understand'. (See Cow v. Casey 6* and *European Asian Bank AG v. Punjab & Sind Bank 7* at p 516 ...

(emphasis added)

(vii) the above principle that a court can deal with a point of law summarily
B was adopted by the Federal Court in a striking out application under O. 18 r. 19 of the Rules of the High Court 1980 (which is *pari materia* with the O. 18 r. 19 of the ROC) in *Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 3 CLJ 81; [2000] 1 MLRA 522; [2000] 3
C MLJ 65; [2000] 2 AMR 2119 where the Federal Court was not persuaded that the proper procedure to argue a point of law was to apply under O. 33. The Federal Court held that the (apex) court had taken a stand, that a matter of law, could be determined at the summary stage even on affidavit evidence. And, reliance was placed
D on the passage cited above in *Bank Negara Malaysia v. Mohd Ismail* (*supra*) which, though concerned with O. 14 of the Rules of the High Court 1980 and which is *pari materia* with O. 14 of the ROC, was based on the same principle as regards dealing with the matter summarily without the necessity of a trial;

E (viii) it cannot be gainsaid, that the successful applicant will be spared the expense of much costs and time too, and the judicial time saved to hold a trial can be utilised for other matters; and

(ix) there will be no prejudice to the party if his or her action is struck out as this party will be entitled to appeal if his writ or pleading is struck
F out but the converse is no longer available.

Overview Of The Notice Of Applications And The Claim By The Ps

[14] Enclosure 133 is the notice of application (NA) dated 12 August 2024 by D2 to strike out the Ps' amended statement of claim (SOC) (2) dated 4 July 2024 (encl. 103) and the re-indorsed writ (2) of 4 July 2024 pursuant
G to O. 18 r. 19(1)(a), (b) and or (d) of the ROC and/or under the inherent powers of this Honourable Court.

[15] Enclosure 135 is the NA dated 21 August 2024 by D1 to strike out the Ps' amended writ (2) and amended SOC (2) both dated 4 July 2024 (encl.
H 103) pursuant to O. 18 r. 19(1)(a) and or (b) or (d) of the ROC or under the inherent powers of this Honourable Court.

[16] Amended SOC (2) (encl. 103) sees the addition of the Pengarah Tanah dan Galian Negeri Johor as a party (D14).

I **[17]** There are 134 Ps. The reliefs sought by them *vis-à-vis* D1 and D2 (encl. 103 pp. 82 to 111 at para. 153) are as follows:

(i) as against D1, disparate amounts of liquidated and ascertained damages for the alleged delay in delivery of possession of the respective units of properties purchased by them respectively ('the said properties') ("LAD claims") under their respective SPAs together with interest thereon at 5% p.a. from the date of the filing of the writ (14 September 2021) until full settlement (encl. 103 pp. 82 to 111);

(ii) as against D1 and D2, a declaration that they are to comply and be bound by reg. 11(1) and the terms and conditions prescribed by Sch. H of the Housing Development (Control and Licensing) Regulations 1989;

(iii) an order that D1 and D2 execute all relevant instruments of transfer to register the Ps as registered proprietors of strata titles with freehold status, free of costs and expenses;

(iv) in the event D1 and D2 fail and/or refuse to execute all the relevant instruments of transfer to have the Ps registered as registered proprietors of strata titles with freehold status, the Senior Assistant Registrar shall be empowered to execute all relevant instruments of transfer and documents;

(v) in the event the relevant transfers to register the names of the Ps as registered proprietors of strata titles of freehold status cannot be registered, the Ps are at liberty to return the said properties to D1 and D2 on condition that D1 and D2 pay to the Ps the following amounts:

(a) the full purchase price of the said properties;

(b) all bank interest that have been borne and are to be borne by the Ps in securing financing from the banks;

(c) loss of interest at 5% of the purchase price of the said properties for those plaintiffs who have purchased their respective properties with cash from the date of payment of D1 until the date of full settlement;

(d) costs and incidental expenses borne and required to be borne by the plaintiffs (in Annexure A attached to the SOC (encl. 103) listing out 76 properties at pp. 116 to 120) arising from the execution of their respective SPAs;

(e) costs and incidental expenses borne and required to be borne by the relevant plaintiffs; and

(f) costs and expenses for the maintenance of the infrastructure and sinking funds paid by the Ps to the joint management body and the management corporation;

(g) such other relief and or general damages to be assessed by this Honourable Court;

(vi) costs of this action on a solicitor client basis; and

(vii) such other order, relief and or damages deemed fit and reasonable by this Honourable Court.

Brief Overview

[18] The papers are voluminous because 134 parties have come together to jointly mount this action. The mere identification of the plaintiffs took up 119 paragraphs in the amended SOC (2). Paragraph 119 is numbered as para. 118A to reflect the addition of the Pengarah, Pejabat Tanah Dan Galian Negeri Johor (P14) as a party to this action on 4 July 2024. However, from the amended SOC (2) (encl. 103), the following brief overview of the background leading to this action can be distilled as follows.

[19] By way of separate sale and purchase agreements (collectively called "SPAs"), the plaintiffs, one of whom is a private limited company (P18), either singly or jointly contracted with D1 and D2 to purchase leases of parcels of stratified housing accommodation in a housing development project known as "The Meridin @ Medini" (the "project").

[20] The respective SPAs are set out in a table (encl. 103 para. 121) setting out the names of each of the plaintiff-purchaser, the unit number of the parcels purchased, the dates of their respective SPAs and purchase price for these properties which comes with a car park if separately purchased for RM50,000 each. A perusal of this table evidences the following dates of SPAs for the respective plaintiffs:

(i) P13 who purchased jointly with P14 – their SPA is dated 6 July 2018;

(ii) P59's SPA is dated 27 August 2018;

(iii) P81's SPA is dated 29 January 2018;

(iv) two SPAs were executed in 2014 (P43's SPA is dated 10 February 2014, and P68's SPA is dated 24 January 2014); and

(v) the rest of the SPAs are dated on disparate dates in 2013.

[21] Thus, it is indisputable, that save for P13 and P14, P59 and P81, the suit of the other 130 Ps (including P43 and P68), was filed on 14 September 2021 which is more than six years after the execution of their respective SPAs.

[22] The project was completed. The purchase price was paid to D1. The Ps acknowledged that vacant possession of the respective leases over the parcels with a sub-divided building erected thereon were or are deemed to have been delivered to all of them. One tranche of the Ps received vacant possession on 13 June 2017 and another on 28 June 2017 (encl. 103 amended SOC (2) para. 131).

[23] Strata titles for their respective parcels have been issued to the Ps. A

[24] The joint management body of the project known as Badan Pengurusan Bersama Pangsapuri Meridian Medini was established on 19 May 2018.

[25] This suit filed on 14 September 2021, is initiated more than four years after vacant possession has been delivered to the Ps. Save for three parcels, this action is commenced approximately eight years after the execution of the SPAs. B

Ps' Claims And Reliefs Sought

[26] The Ps' claims are grounded on two causes of action *viz*: C

(i) LAD claims for delay in delivery of vacant possession of the parcels they purchased; and

(ii) that they were sold leases in contravention of the National Land Code and/or 2020, and the Strata Titles Act 1985.

[27] Besides the LAD claims, the Ps' further claims that D1 and D2 are to execute such instruments as may be relevant to have the Ps registered as proprietors of the parcels they have purchased with freehold status free of any costs and expenses, and in the event, this is cannot be done, they are entitled to return their respective parcels to D1 and D2 on the condition that: D E

(i) D1 and D2 pay to the Ps the entire purchase price, all interest borne by the Ps in securing financing from financial institutions;

(ii) damages computed at 5% of the purchase price of the parcels for those purchasers who have purchased in cash, costs and all incidental expenses including payments made for the maintenance of the infrastructure and the sinking fund; and F

(iii) such other reliefs or damages as this Honourable Court may deem fit.

LAD Claims

[28] In their statement of claim, the Ps led with their LAD claims (encl. 103 paras. 124 to 133). In other words, their LAD claims were pursued first. Suffice to say, it is indisputable that their LAD claims can only succeed if the SPAs are valid. They assert it is valid if the timeline for delivery of vacant possession is 36 months and all the Ps seek relief by way of liquidated damages computed on this 36 months' timeline (encl. 103 para. 153 (A) and (B)). G H

[29] I observed that the Ps pursued their LAD claims with vigour and continued to hold onto their LAD claims when resisting the striking out applications filed by D1 (encl. 135) and D2 (encl. 133) by challenging the extension of time of 12 months given by the Controller. At no time did they abandon their LAD claims. I

[30] The Ps assert that D1 and D2 had acted unlawfully and/or had contravened the provisions of the Housing Development (Control and Licensing) Act 1966 ("1966 HDA"), and the Housing Development (Control and Licensing) Regulations 1989 ("1989 HD Regulations") in amending the timeline for delivery of vacant possession from 36 months to 48 months, and in not complying with the provisions of Schedule H and reg. 11(1) of the 1989 HD Regulations. Therefore, the Ps assert such an amendment is invalid and does not bind the Ps (encl. 103 paras. 125 and 126). In other words, the Ps' claim that D1 and D2 are still bound to deliver vacant possession within 36 months.

[31] On the premise that D1 was to deliver vacant possession of the said properties within 36 months, the Ps made LAD claims which are tabulated (encl. 103 para. 133).

Sale Of Leases In Contravention Of The National Land Code Or Act 828 2020 ("NLC"), Strata Titles Act 1985 ("STA") And Strata Management Act 2013 ("SMA")

[32] Save for those plaintiffs who have jointly entered into the SPAs with D1 and D2, the format of the SPAs is identical. In summary, the preamble of the SPAs sets out:

(i) that D1 is the vendor;

(ii) D2 is the registered and beneficial proprietor of all that freehold land held under HS (D) 478932 PTD 170665, Mukim Pulai, Daerah Johor Bahru, Negeri Johor ("the said land");

(iii) D2 has granted to Medini Land Sdn Bhd a lease over the said land for 99 years ("the said lease");

(iv) the said lease will be registered in accordance with the provisions under the National Land Code Act 56 of 1956;

(v) D1 has agreed to purchase the said lease from Medini Land Sdn Bhd *vide* an agreement dated 18 October 2012 and upon completion of the purchase, the said lease will be transferred to D1 free of encumbrances; and

(vi) that D1 has been granted the absolute right to develop the said land as a housing development ("the Medini project"), and to sell the leases over the parcels comprised within any building erected or to be erected on the said land.

[33] Under the SPAs, D1 agreed to sell and the respective Ps agreed to purchase a lease over disparate and identified parcels with vacant possession and a building with accessory parcel with vacant possession to be held by the Ps as a lessee for the remainder of the lease tenure and upon the terms of the lease subject to the terms and conditions set out in the SPAs.

[34] Besides, asserting that the terms of the SPAs contravene the 1966 HDA and the 1989 HD Regulations for their LAD claims, the Ps also assert that the SPAs ought to be invalidated for having contravened the NLC, STA and SMA.

[35] The Ps assert as follows:

(i) under the SPAs they purchased a "private" lease and not a State lease;

(ii) under a State lease the purchaser is recognised as a registered proprietor for purposes of the NLC and he has proprietary rights over the property. Whereas, under a private lease, the Ps do not;

(iii) the issue document of title ("IDT") of the property issued by the land office when a purchaser purchases a State lease will show the name of the purchaser as the registered proprietor. Whereas, under a private lease the purchaser-plaintiffs are only the lessees and have no proprietary rights save for contractual rights while the lessor (D2) is the registered proprietor and has proprietary rights over the property;

(iv) the NLC recognises the proprietary rights of the registered proprietor of a leasehold property held under a State lease but not in the case of a lessee of a private lease;

(v) the NLC only deals with the creation of leases and tenancies in Part Fifteen of NLC (see ss. 221 to 240);

(vi) in a case of a leasehold property held under a State lease, the property would revert to the State upon the expiry of the lease period but in most cases of a State lease, the purchaser would only need to pay a premium to the State for extending the lease period;

(vii) in the case of a private lease, the property would revert to the registered proprietor (D2) upon the expiry of the lease period but as the registered proprietor in a private lease is a private corporation unlike a State lease where the property is held by the State, and therefore, the renewal of a private lease is not straight forward;

(viii) the State has a moral obligation to renew the lease upon its expiry while the registered proprietor of a private lease has an absolute discretion to impose such terms beneficial to the private corporation and the purchaser has no negotiation power, and are at the mercy of the private corporation. The Ps assert it is, therefore, truly a case of take it or leave it once the lease period expires in which event, the purchaser would be required to vacate the property and surrender the lease to the registered proprietor; and

(ix) there are also other issues as to what happens if the registered proprietor goes into liquidation or if the registered proprietor decides to sell the property in which case the new owner may have a different plan to re-develop the property. If the new owner takes on a loan and charge the property as a security for the loan and if the new owner goes into liquidation or defaults on the loan, the purchaser may be at the mercy of the liquidator or the bank.

Court's Analysis And Findings

LAD Claims

[36] In the landmark case of *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] MLJ 281; [2019] 8 AMR 297; [2019] 6 MLRA 494, the Federal Court at para. 60, held that the Controller of Housing has no power to waive or modify any provision in the Sch. H contract of sale because s. 24 of the HDA does not confer power on the Minister to make regulations for the purpose of delegating the power to the Controller of Housing to waive or modify the Sch. H contract of sale. Therefore, the Controller of Housing has no power under the HDA or HD Regulations to modify the statutory contract of sale entered into by house buyers under the HDA, and certainly cannot extend the statutory completion period of 36 months prescribed under the contract. The Federal Court's decision was handed down on 26 November 2019.

[37] Undoubtedly inspired by the Federal Court decision of *Ang Ming Lee*, the Ps commenced the instant action on 14 September 2021 (encl. 1) challenging the extension of time granted by the Controller of Housing for the Medini Project.

[38] However, on 26 July 2024, the Federal Court handed down its decision in *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals* [2024] 8 CLJ 519; [2024] 5 MLJ 897; [2024] 6 AMR 813; [2024] 6 MLRA 1 holding that:

(i) the decision in *Ang Ming Lee* does not have retrospective effect on extensions granted by the Controller of Housing before *Ang Ming Lee*;

(ii) extensions granted by the Controller of Housing before *Ang Ming Lee* are valid;

(iii) if *Ang Ming Lee* is to have a retrospective effect, there would be serious ramifications and repercussions to the housing developers who have placed reliance on the existing laws and had diligently complied with the said laws which were, at that time, valid;

(iv) for purposes of limitation, the cause of action would have accrued from the date of the execution of the SPAs;

(v) where an innocent party had relied on an earlier decision made by a public authority that was subsequently declared *ultra vires*, the second actor theory applies and should be the perfect and preferred antidote; and

(vi) parties to a SPA, who had agreed to extended completion periods in the SPA and have, in fact, received liquidated ascertained damages, cannot subsequently claim additional damages, even if the original extension is later found to be illegal.

[39] Wherefore, I agree with the submissions presented by both D1 and D2 that in view of the Federal Court's decision of *Obata-Ambak*, the LAD claims by the Ps are without merits for the following reasons:

(i) the impugned decision of the Controller of Housing giving the extension of time in the Medini Project from 36 months to 48 months was on 16 July 2013;

(ii) in *Obata-Ambak,* it was clarified that *Ang Ming Lee*'s decision has only prospective effect which renders the decision of the Controller of Housing in this case which were given prior to the Federal Court decision in *Ang Ming Lee* to be valid;

(iii) it was also clearly decided by the Federal Court in *Obata-Ambak* at paras. 132 and 135, that any challenge to the Controller of Housing's decision giving an extension of time or to vary any of the terms in the statutory form as prescribed in Sch. H of the 1989 HD Regulations sound in public law and would have to be challenged by judicial review. See also *Tropika Istimewa Development Sdn Bhd v. Wong Hang Fah & Ors* [2025] 8 CLJ 540; [2025] 5 MLRA 326; [2025] MLJU 1467; [2025] AMEJ 1122 decision handed down on 22 May 2025 paras. 44 to 51 and 55 and 56 and which was brought to the attention of this court by D1;

(iv) here the Ps did not, and they are obviously out of time to do so pursuant to the timeline of three months provided by O. 53 r. 3(6) of the ROC from the date the decision was first communicated to the Ps *via* the respective SPAs executed by them on diverse dates ranging from 29 June 2013 to 27 August 2018, see the dates of the SPAs entered into by the Ps in para. 121 of their amended statement of claim. In fact, in the Ps' written submissions, the Ps concede the earliest they would know would be 27 February 2017 (see Ps' submissions in encl. 153 para. 3.63) or latest by 7 October 2020 (Ps' submissions in encl. 153 para. 3.68) and thus, all the Ps are hopelessly out of time to challenge the extension of time granted by the Controller;

(v) that the second actor theory elucidated by the Federal Court in *Obata-Ambak* at paras. 112, 113 and 129 applies squarely in this case as D1 and D2 have gone about to secure all the approvals or endorsements for the Medini project and exemptions from the relevant authorities such as the Iskandar Regional Development Authority, the Johor State Economic Planning Unit, the Department of Land and Mines Johor (see encl. 134 exh. IIB-4 pp. 116 to 129) and the Ministry of Housing and Local Government (see encl. 155 para. 8) for the Ps who are foreign purchasers to invest and purchase parcels below the threshold limit of RM500,000 (encl. 134 exh. IIB-4 pp. 115 to 129); and

(vi) further and in any event, limitation of six years for the Ps' causes of action (save for P13 and P14; P59 and P81) run from the date of the execution of the SPAs and have set in by the time this action was filed and thus are time-barred, see *Nasri v. Mesah* [1970] CLJU 85; [1970] 1 LNS 85; [1971] 1 MLJ 32.

[40] Thus, the LAD claims by all the Ps have been rendered obviously unsustainable, frivolous or vexatious in their continued pursuit, and are struck out.

Sale Of A Private Lease

[41] As mentioned, the Ps have pursued their LAD claims with vigour. Thus, they seek to enforce the SPAs they have each respectively made with D1 and D2. In other words, they can only succeed in their LAD claims if their SPAs are valid and that the timeline for delivery of vacant possession of their respective leases and parcels is 36 months and not 48 months per unit. They persisted with the LAD claims despite them being aware of the *Obata-Ambak* decision of the Federal Court which was handed down on 26 July 2024.

[42] I observed that the law firm of Messrs KL Wong were solicitors in both the decisions of the Federal Court cases of *Ang Ming Lee* and *Obata-Ambak* reported in the established and reputable law publications of the Current Law Journal, the Malayan Law Journal and the All Malaysia Reports. Besides this law firm of Messrs KL Wong, it is reported that the counsel for the Ps in the instant action is one of the co-counsel in the *Obata-Ambak* case at the Federal Court.

[43] In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770, Gopal Sri Ram JCA (later FCJ) speaking for the Court of Appeal said it is accepted as well-settled:

> ... that the knowledge of a solicitor is regarded by the law as the knowledge of the client. The only exception to this is where the solicitor acts fraudulently *vis-a-vis* his client

[44] It is clear that the Ps continued to pursue their LAD claims in the course of resisting the striking out applications on the premise that their SPAs are valid despite knowing the decision and its legal effects handed down by the Federal Court in *Obata-Ambak*. For learned counsel for the Ps to continue to assert that limitation does not apply (encl. 153 paras. 3.44 to 3.70) despite the Federal Court in *Obata-Ambak* having clearly held it does, with he being one of the co-counsel therein, is unexpected.

[45] In fact, every one of the buildings purchased by the Ps have been constructed with vacant possession delivered to each of them. The joint management body of the Medini project named Badan Pengurusan Bersama Pangsapuri Meridian Medini has been established on 19 September 2018 (encl. 134 exh. IIB-5 pp. 131). And, some of the Ps have been issued with individual strata titles for the parcels they have purchased (encl. 134 exh. I IB-6 pp. 132 to 147).

Approbating And Reprobating

[46] In the circumstances, for the Ps to assert in the same breath that their SPAs are illegal and they ought to be refunded the purchase price paid together with damages in the form of interest of loss of use of money for those who paid in cash or financing costs for those who took loans to purchase is clearly a case of them blowing hot and cold or in legal parlance, approbating and reprobating. This the court will not countenance.

[47] In *Cheah Theam Kheang v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16; [2012] 1 MLJ 761; [2011] 2 MLRA 660 at para. [105] the Court of Appeal cited and adopted the following words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v. News (UK) Ltd & Others* [1990] 3 All ER 376 at pp. 383 to 384:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitude towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

[48] In *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565; [1997] 1 MLRA 284; [1997] 3 AMR 2458, the Federal Court succinctly clarified the principle as follows:

> In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. *If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course.* ... (emphasis added)

[49] To underscore the point that the Ps want to hold onto the benefit of the SPAs, they have even prayed for the leases they have purchased to be converted to freehold status. With respect, such a claim is misconceived and devoid of merit. The SPAs they entered into expressly provide that they are purchasing parcels of leases. It is clearly stated in the SPAs that:

> AND WHEREAS the Vendor had agreed to sell and the Purchaser has agreed to purchase a lease over the parcel with vacant possession more particularly described on Section 3 of the Sixth Schedule hereto ... to be held by the Purchaser as a lessee for the remainder of the Lease Tenure and upon the terms of the said Lease subject to the terms and conditions hereinafter contained.

[50] Reliance by the Ps on the authority of *Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor)* [2015] 2 CLJ 10; [2014] 5 MLRA 211; [2015] 1 MLJ 255; [2014] 5 AMR 1 to seek an order for their parcels to be converted to freehold status is misplaced. This is because the plaintiff in *Leo Leslie Armstrong* was the registered proprietor of land which was freehold before it was unlawfully converted into leasehold by the State authority. The Court of Appeal there agreed with the plaintiff that the State authority had acted *ultra vires* their powers under the NLC in doing so. This led the Court of Appeal to allow the appeal and to make an order that the plaintiff is entitled to have the status of YMCA's land restored to one which is freehold.

[51] In my considered view, the Court of Appeal authority of *Leo Leslie Armstrong* does not favour the Ps on the point of acquiescence. At para. 53, the Court of Appeal held that if a party has knowledge of a decision and understood its legal implications, they have acquiesced to the act complained of. In consequence, they would be estopped from challenging the same.

[52] In the instant case, the SPAs clearly provide that the Ps are purchasing leases and they have all taken delivery of vacant possession of their parcels. In this action, they were all represented by the same set of solicitors who were solicitors and counsel in the *Obata-Ambak* case, and despite knowing the legal implications of the Federal Court decision, persisted with their LAD claims which can only be grounded upon the SPAs being valid save as to challenging the timeline for delivery of vacant possession. Thus, the Ps having elected to affirm the validity of the SPAs and had even sought for their purchase of leases to be converted from leasehold to freehold, are clearly estopped from challenging the validity of the SPAs.

[53] In the circumstances, for the Ps to seek to have the SPAs declared null and void is an abuse of process and their claims should be struck out.

[54] Be that as it may, I will now deal with the other points raised by the Ps.

State Lease v. Private Lease

[55] The Ps seek to differentiate between the rights of a proprietor of a State lease and a private lease. A short answer to this is there is no such differentiation provided in the NLC. As to how a proprietor of the State land and a non-State proprietor of freehold land would deal with the land following the end of a lease is purely speculative. The Ps assert that the State is more likely to renew the lease based upon moral obligations.

[56] The Federal Court had occasion to say that it is a court of law and not a court of morals in *The Co-Operative Central Bank Ltd (In Receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300; [1995] 3 MLJ 313; [1995] 1 MLRA 753; [1995] 1 AMR 2751. This was repeated by the Federal Court in *Koperasi Rakyat Bhd v. Harta Empat Sdn Bhd* [2000] 3 CLJ 719; [2000] 3 MLJ 81; [2000] 1 MLRA 456; [2000] 2 AMR 2311 where Gopal Sri Ram JCA (later FCJ) stated:

> [36] However; we repeat, this is not a court of morals but a court of law and, if the counsel for the chargor company is correct in his contentions, he is entitled to succeed.

[57] A look at the statutory form of sale and purchase contract in Schedule H under the 1989 HD Regulations will show that the proprietor and vendor can be the registered and beneficial owner of either freehold or leasehold land intended for subdivision into parcels.

Purchase Of Leases

[58] The preamble of Sch. H and its cl. 11(1) is set out below:

> Sale And Purchase Agreement (Building Or Land Intended For Subdivision Into Parcels
>
> Preamble
>
> WHEREAS the *Proprietor Vendor is the registered and beneficial owner of all that *freehold land/leasehold land of ... years expiring on ... held under ... (description of title) and No. of Title ... *Lot No./L.O. No ... Section ... in the *Town/Country ... Federal Territory of Labuan ... in an area measuring approximately ... hectares/square metres (hereinafter referred to as "the said Land") * and has granted the Vendor the absolute right to develop the said Land as a housing development and to sell the said Land;
>
> 11. (1) *The *Proprietor/Vendor shall, at its own cost and expense and as expeditiously as possible, apply for subdivision of the said Building or Land intended for subdivision into parcels, as the case may be, so as to obtain the issue of a separate strata title to the said Parcel under the Strata Titles Act 1985* as extended and modified by the Federal Territory of Labuan (Extension and Modification of Strata Titles Act 1985) Order 2009 [P.U. (A) 458/2009].
>
> (emphasis added)

[59] Thus, purchasing a building described as parcel under the statutory Schedule H can be one where the subsequent strata title can be either of freehold or leasehold status.

[60] The SPAs entered into by the Ps clearly said that they are buying parcels which is leasehold. The Ps placed reliance *Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal* [2020] 7 CLJ 720; [2020] 4 MLRA 450; [2020] 6 AMR 660 which held that there is a difference if one's title is a leasehold title to begin with, for then, the transfer is the whole of the leasehold interest in the land to the purchaser with a reversion to the State at the end of the leasehold title. The Court of Appeal in *Loh Tina* went on hold that the developer itself cannot arrogate unto itself the right to convert the sale to a lease in favour of the purchaser as follows:

> [80] That may be a creative interpretation placed by learned counsel for the developer which found favour with the learned judge but where the standard form of contract for sale is the contract for sale in the SPA, in Schedule G, the developer cannot arrogate to itself the right to convert the sale to a lease in favour of the purchaser without the approval of the Controller.
>
> [81] To allow that would be to open the floodgates to all developers to modify the standard statutory form of SPA in Schedule G as they please and to carve out exceptions and exemptions as they like by creating a lease rather than an outright sale. Purchasers who are unaware of their rights would be at the mercy of developers who would want a second round of development business after the expiry of the lease granted and doubtless the purchasers would have to vacate the housing accommodation that they have fully paid for upon the expiry of the lease. See cl. 18 of the annexure lease agreement on "surrender of possession of the property."

[61] In the instant case, D1 had purchased the said lease from D2 who the proprietor of is the said (freehold) land. They had obtained all the necessary approvals from the authorities including the Controller to sell parcels of leases of the said lease. Schedule H of the HD Regulations (*supra*) makes it clear that the proprietor (D2) and the vendor (D1) "shall, at its own cost and expense and as expeditiously as possible, apply for subdivision of the said building or land intended for subdivision into parcels" and this was exactly what they (D1 and D2) have done. In fact, separate issue documents of strata titles have been issued to some of the Ps (encl. 134 exh. I IB-6 pp. 132 to 147). An example of the strata title issued is reproduced below.

135 DHKK

AKTA HAKMILIK STRATA 1985

BORANG 4(K)

[Subperenggan 3(a) dan (b) dan 5(6) Jadual Kelima]

HAKMILIK STRATA

NO. HAKMILIK	NO. BANGUNAN	NO. TINGKAT	NO. PETAK
GERAN 528886	M1B	31	576

Cukai	: -
Pegangan untuk selama-lamanya.	
Negeri	: Johor
Daerah	: Johor Bahru
Bandar/Pekan/Mukim	: Mukim Pulai
No. Lot	: LOT 194101
Luas Petak	: 108.0 Meter Persegi
Petak Aksesori	: A674, A675, A2107
Jumlah Luas Petak Aksesori	: 29.0 Meter Persegi
Unit Syer Petak	: 123
No. Pelan Strata Yang Diperakui	: PA(B) 200283-52, PA(B) 200283-10
No. Baru Daftar Strata	: 1331

Petak dan petak aksesori (jika ada) yang tersebut di atas yang terletak di atas tanah adalah dipegang bagi tempoh hakmilik itu sepenuhnya oleh pemilik yang pada masa itu dinamakan dalam rekod kemasukannya di dalamnya tertakluk kepada peruntukan Akta, kepada peruntukan kaedah-kaedah yang dibuat di bawahnya dan tertakluk sekali kepada memorial, pengecualian dan catatan lain. Apa-apa cara tanah berhubung dengan hakmilik strata ini adalah tertakluk kepada sekatan dan syarat yang dinyatakan di dalamnya.

Menurut kuasa hakmilik ini, pemilik tersebut juga mempunyai hak mengundi dalam perbadanan pengurusan berkadaran dengan unit syer bagi petak ini sebagaimana yang dinyatakan, berhubung dengan keseluruhan jumlah unit syer.

Bertarikh pada 7 Julai 2019

T.M. .....

Pendaftar

Pelan bagi petak dan petak aksesori (jika ada), bagi tujuan pengenalpastian, dilampirkan di Borang 5(K).

**Matikkan sebagaimana yang berkenaan*

ID Hakmilik : 010203GRN005288B6M1B01:00576
Tarikh : 25/08/2020
No Versi : 2

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SYARAT NYATA

i) Tanah ini hendaklah digunakan sebagai bangunan bertingkat untuk tujuan Apartment / Kondo, dengan mengikut peran yang ditetapkan oleh Pihak Berkuasa Tempatan yang berkenaan.
ii) Segala kekurangan dan pencerunan akibat daripada aktiviti ini hendaklah diselaraskan/dibuang ke tempat-tempat yang telah ditentukan oleh Pihak Berkuasa Berkenaan.
iii) Segala dasar dan syarat yang ditetapkan dan dikuatkuasakan dari semasa kesemasa oleh Pihak Berkuasa Berkenaan hendaklah dipatuhi.

SEKATAN KEPENTINGAN

Tiada

REKOD PERBADANAN PENGURUSAN

PERBADANAN PENGURUSAN PANGSAPURI MERIDIAN MEDINI
NO 17, 19 & 21, BLOCK A,KOMPLEKS AUSTIN PERDANA
JALAN AUSTIN PERDANA 2
TAMAN AUSTIN PERDANA
JOHOR BAHRU
81100
JOHOR

REKOD KETUANPUNYAAN

ISKANDAR INVESTMENT BERHAD, (#) Migh
No Syarikat: 752101-D
WISMA MAH SING, PENTHOUSE SUITE 1, NO 163, JALAN SG. BESI, KUALA LUMPUR 57000
WILAYAH PERSEKUTUAN KL

REKOD URUSAN

No. Pers 40702/2013 Pajakan Seluruh Tanah
kepada
STEVEN SIM KIA SENG, Warganegara Malaysia, No. Pasport : K6540269A
APARTMENT BLOCK 219A, JURONG EAST STREET 21, #02-585,
do1219 SINGAPORE -, Luar Malaysia
selama 99 tahun 0 bulan 0 hari
mulai dari 15 April 2013 dan berakhir pada 14 April 2112
didaftarkan pada 24 Ogos 2020 jam 12:20:38 petang

*Maklumat sebagaimana yang berkenaan

ID Rekmlik : 010203GRN0053888M1R0100535
Tarikh : 25/08/2020
Muka Surat 2 [3]

135 DHKK

No. Pers 53056/2020 Cadalan Pajakan

dari

STEVEN SIM KIA SENG, No. Passport : K1643289R, sebagai Peruntung Pajakan

kepada

CIMB BANK BERHAD, No. Syit : 13491-P

2A (1ST FLOOR), JALAN DEDAP 20, TAMAN JOHOR JAYA,

JOHOR BAHRU 81100 Johor

didaftarkan pada 24 Ogos 2020 jam 12:35:39 Petang

Surat Kuasa Wakil : 236/2004

PERKARA LAIN YANG MELIBATKAN HAKMILIK

T.M.

*Maklumat sebagaimana yang dinyatakan

ID Haluan : 010303GSM005288SM1B03100576

Tarikh : 25/08/2020

No. Versi : 2

S/N 9xDODNW2dEmBeGo9XC4ybA

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[62] The Ps asserted that the SPAs are in contravention of the NLC (encl. 153 pp. 15 to 18). In summary, the Ps assert that at the time the Ps entered into the SPAs, the said lease has yet to be subdivided into parcels with separate strata titles. Therefore, the SPAs are in contravention of s. 221(3) of the NLC because under the SPAs the Ps are sold parcels of leases of more than 30 years.

[63] The following assertions of the Ps are set out to understand their submissions:

A (i) the lease granted by the proprietor (D2) to Medini Land Sdn Bhd was for a period of 99 years and it relates to the whole of the said land held under a master title;

(ii) the sale of the said lease by Medini Land Sdn Bhd to the developer (D1) was in respect of the remainder period of the said lease over the whole of the said land held under a master title;

(iii) upon completion of the sale of the said lease by Medini Land to the developer (D1), D2 granted to D1 an absolute right to construct a building as a housing development and to sell the leases of the parcels to the purchasers;

(iv) by separate tripartite SPAs entered between the D1, D2 and the purchasers, D1 had agreed to sell to the purchasers a lease over the respective parcels;

(v) the Ps assert that it is important to note that at the time when the sale and purchase agreement was signed between the parties, the master title has not been sub-divided and the parcel/strata title has yet to be issued by the relevant authorities;

(vi) prior to sub-division of the master title and issuance of strata title, there is only one lease registered on the master title and the said lease had commenced on 15 April 2013 and to run for 99 years;

(vii) section 221(1) of the NLC provides that a proprietor of any alienated land may grant leases of the whole or any part of the alienated land. It reads as follows:

> Subject to the provisions of sections 225 and 226, the proprietor of any alienated land may grant leases of the whole or any part thereof in accordance with the following provisions of the section.

(viii) section 221(3) of the NLC provides that the maximum term for which any lease may be so granted shall be:

(a) 99 years if it relates to the whole of any alienated land; and/or

(b) 30 years if it relates to a part only thereof;

(ix) for purposes of the NLC, s. 5 defines "alienated land" as follows:

> means any land (including any parcel of a subdivided building) in respect of which a registered title for the time being subsists, whether final or qualified, whether in perpetuity or for a term of years, and whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law, but does not include mining land.

(x) the Ps asserts that for any land or parcel of a subdivided building to fall under the definition of an "alienated land", a registered title has to have been issued by the land office. However, in the present case, at the time when the SPAs were signed between the Ps, the proprietor (D2) and the developer (D1), there were no parcels of a subdivided building in respect of which a registered title has been issued and no application has been made for subdivision;

(xi) section 221(3) of the NLC provides that the maximum period for which a lease can be created over a whole of any alienated land (land/parcel of a subdivided building) is 99 years and if it relates to a part only is 30 years;

(xii) thus, the Ps assert that the proprietor (D2) can only create a lease in respect of part of the land (where strata title has not been issued) for a maximum period of 30 years. And, it cannot be said that that the lease was created for the whole of an alienated land as the strata title for the parcel has yet to be issued by the land office at the material time.

(xiii) the tenure of the said lease for the said land held under the master title is for a period of 99 years commencing from 15 April 2013 and expiring on 14 April 2112;

(xiv) the sale of the lease (where strata title has not been issued) was in respect of the remainder period of the said lease held under the master title. There is only one registered master title issued by the land office at that material time;

(xv) the Ps pointed out that under cl. 1 of the SPAs, it is provided that:

> The Vendor hereby agrees to sell and the Purchaser agrees to purchase a lease over the said Parcel remainder of the Lease Tenure and upon the terms and conditions contained in this Agreement.

(xvi) in this case because the strata title has yet to be issued by the land office, the Ps assert that the lease cannot be created over the strata title (which has yet to exist). Hence, the sale of the lease only relates to the remainder period of the lease held under the master title or the said land;

(xvii) the Ps assert that D1's and D2's assertion that the lease will be created upon issuance of the strata title is flawed and untenable because no strata title has been issued by the land office for purposes of creation of a lease over a parcel. Hence, the Ps assert that D2 can only create a lease in respect of part of the land (where strata title has not been issued) for a maximum period of 30 years;

(xviii) in the present case, the purchasers (*sic* – should be D1) (encl. 153 paras. 3.21) had granted a lease to the purchasers for a period exceeding 30 years, and thus, the Ps asserted that the sale of the lease to the purchasers is null and void in contravention of s. 221(3)(b) of the NLC; and

(xix) the Ps go on to conclude on this point by asserting that therefore, their claim is not obviously unsustainable.

[64] During the presentation of oral submissions, learned counsel for the Ps, asserted that what D1 and D2 ought to have done is to first build then sell and not sell then build.

[65] In my considered view, the Ps argument that the SPAs are in contravention of the s. 221(3)(b) of the NLC at the time the SPAs were entered into is devoid of merit for the following reasons:

(i) it is a blinkered view, because at the time of the making of the SPA it is clearly made known that the purchasers will each get a sub-divided parcel of lease for a term which will reflect the remainder of the lease tenure of the said lease ending 14 April 2112;

(ii) what is important is to consider the totality of the bargain the purchasers have entered into, which is, when it comes time for performance, they will each get a sub-divided strata title for the remainder of the lease tenure ending 14 April 2112, and upon issuance of a strata title, their parcels would be alienated land for purposes of s. 5 of the NLC for which a lease can be granted for up to 99 years as provided by s. 221(3) of the NLC;

(iii) to only restrictively focus on the position of the parties at the time of the making of the contract on whether a party can perform when the focus ought to be on the time for performance is wholly misplaced;

(iv) clause 4A(1) of the SPAs provides, *inter alia,* that D2 shall immediately upon the issuance of a separate title to the parcel permit the purchasers to obtain a valid and registrable lease for the remainder of the lease tenure (ending 14 April 2112);

(v) sections 47 to 51 of the Contracts Act 1950 lay down elaborate provisions on time and place for performance and s. 47 expressly provides that, "Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time";

(vi) I observe that no issue is being taken by the Ps that D2 has delayed in applying for separate strata titles for the parcels sold;

(vii) in this case, the buildings on the parcels purchased by the Ps have been constructed with the time allowed by the Controller with vacant possession delivered, and a number of strata titles issued and the remaining ones being work in progress;

(viii) when the Ps enter into the SPAs they are beneficial or equitable owners of the parcels, even though yet to be vested with legal rights, and stand in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large, see *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193; [2016] 2 MLRA433; [2016] 3 MLJ 23; [2016] 2 AMR 813 para. 39 as per Arifin Zakaria CJ; and

(ix) if the Ps argument were to be accepted, it would put an end to the sales of sub-divided buildings which are to have leases of more than 30 years where applications for separate strata titles are to be made. With respect, this will mean the court is to read into Sch. H a restriction which is not there, and this, the court will not do.

[66] Having entered into SPAs for the purchase of parcels of leases with sub-buildings to be constructed thereon and having paid the purchase price and taken vacant possession of the same with some of the separate issue documents of strata titles having been issued with the remainder in the process of being issued, what the Ps are now seeking is to ask the court to rewrite the terms of their SPAs.

[67] On top of that, the Ps seek the court to order D1 and D2 to execute all relevant instruments of transfer to register the Ps as registered proprietors of strata titles with freehold status, free of costs and expenses, failing which they want their money back together with interest on their purchase price and financing costs.

[68] It is thus apparent, that what the Ps are seeking is to utilise the court's process to rewrite the bargain they have made. This is not only frivolous and vexatious, but also an abuse of process grant of lease or tenancy to two or more persons or bodies.

[69] Next, the Ps assert that D1 had relied upon a trust deed signed by joint purchasers to circumvent ss. 214(3) and 225(2) of the NLC which provides that:

i) 214(3) Without prejudice to paragraph (a) of sub-section (2), no lease or charge may be transferred to two or more persons or bodies otherwise than as trustees or representatives.

ii) 225(2) ... no lease or tenancy may be granted to two or more persons or bodies otherwise than as trustees or representatives.

[70] Amongst the 134 plaintiffs, besides those who have entered into the SPAs individually, there a number who had entered into SPAs jointly. In other words, there are 25 SPAs made with two joint-purchasers (encl. 103 para. 133). As the SPAs are for the purchase of leases, the Ps challenged

whether the trust deeds executed by those who had purchased jointly is a sham designed to circumvent the provisions of ss. 214(3) and 225(2) of the NLC. They assert that D1 and D2 have not provided a copy of the trust deed and thus, this issue can only be determined at trial and their claim ought not to be struck out summarily.

[71] Contrary to the Ps' assertion, a copy of the trust deed template approved by the Pengarah Pejabat Tanah Dan Galian Negeri Johor (D14) was in fact exhibited (encl. 141 exh. IIB-8 pp. 37 to 44). Clause 2 thereof provides:

> The Trustees hereby voluntarily declare that they hold the said Lease on trust for each of the Beneficiaries in the proportion set out in Section 3 of the First Schedule and hereby agree to fully comply with the instructions and directions of the Beneficiaries and shall execute and do what is necessary to protect the interest of the Beneficiaries. For avoidance of doubt and notwithstanding anything stated in this Deed, the Trustees hereby agree to jointly hold the said Lease on trust for each of the Beneficiaries in accordance with the terms and conditions stated herein.

[72] It is clear to me that to cater for those who are joint purchasers such as husband and wife or family members, D1 and D2 being conscious of the provisions of the NLC which do not allow a lease to be transferred to two or more persons otherwise than as trustees or representatives, the trust instrument was drawn up. It was designed to comply with the law instead of circumventing the law.

[73] As pointed out by D2, it would be apposite at this juncture to refer to ss. 345(1) and 347(3) of the NLC which provide that:

> S. 345(1)
>
> Where, pursuant to section 344 or the corresponding provisions of any previous land law, any land, share or interest is registered in the names of two or more persons or bodies "as trustees", it shall be held by them jointly; and accordingly, on the death of any of them or, in the case of a body, its dissolution, the said land, share or interest shall vest exclusively in the other or others.
>
> S. 347(3)
>
> Subsection 345(1) shall apply where any land, share or interest is vested in two or more persons or bodies "as representatives" as it would apply if they were registered in respect thereof "as trustees".

[74] In their book entitled "*Land Law in Malaysia: Cases and Commentary* (3rd edn)" by Teo Keang Sood and Khaw Lake Tee, learned authors opined as follows on the position of "trustees" in respect of leases over land under s. 225(2) of the NLC:

The meaning of section 225(2) is not entirely clear. There appears to be two possible interpretations. It could mean that a lease or tenancy in favour of two or more persons or bodies is void unless it is held by those persons or bodies as trustees or representatives: see *Lee Lum Soh v. Low Ngah**. Alternatively, it could refer to the effect of granting a lease or tenancy in favour of two or more persons or bodies. Under the National Land Code 1965, any land, share or interest registered in the names of two or more persons or bodies as trustees or representatives is held by them jointly and accordingly, on the death of any of them, or in the case of a body, its dissolution, the land, share or interest shall vest exclusively in the other or others. Hence, when section 225(2) provides that no lease or tenancy may be granted to two or more persons or bodies otherwise than as trustees or representatives, it could mean that the lease or tenancy is to be held by such persons or bodies jointly.

*[1973] 1 MLJ 97 (HC) and referred to in *Tan Kwee Eng v. Tan Yui Wah* [2009] MLJU 747 (HC).

[75] Further reference was made by learned counsel for D2 to the case of *Ang Beng Tee v. Lee Yit Hoe & Ors* [2018] CLJU 1111; [2018] 1 LNS 1111; [2018] MLRHU 873 which held that a lease cannot be granted to two or more persons, and the commentary in the textbook by Judith Sihombing on "*National Land Code, A Commentary*", 2021 Desk edn on s. 225(2) of the NLC that "Land may be held by two or more persons or bodies as joint tenants if they are trustees or personal representatives".

[76] Learned counsel for D1 and D2 sought to draw a distinction between a grant of a lease or tenancy and a transfer, and postulated that the former is prohibited whereas the latter is permissible. Reference was made to the authorities of *Registrar Of Titles, Johore v. Temenggong Securities Ltd* [1976] CLJU 135; [1976] 1 LNS 135; [1976] 2 MLJ 443 and *Seaport Worldwide Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2020] CLJU 1442; [2020] 1 LNS 1442; [2020] MLJU 1502 where the transfer of leases was upheld.

[77] However, our Federal Court in *Tan Kiaw v. Gan Chye Khoon* [1983] 1 CLJ 292; [1983] CLJ (Rep) 404; [1983] 1 MLRA 207; [1983] 2 MLJ 109; held that the prohibition against a grant of a lease or tenancy in s. 225(2) of the NLC applies only to a registered lease or a tenancy in excess of three years. In *Registrar Of Titles, Johore v. Temenggong Securitie*s [1976] CLJU 135; [1976] 1 LNS 135; [1976] 2 MLJ 44; [1976] 1 MLRA 180, the Privy Council held that "The only interests capable of being registered are title, leases (including subleases) for a term exceeding three years, charges on land and easements over the land".

[78] Under the doctrine of *stare decisis*, I bound to follow these two cases, one by the Federal Court and the other by the Privy Council which sat on appeal against the decision of our Federal Court. Reading these two cases together, in my considered view, the law is clear that a grant of a tenancy to two or more persons or bodies is permissible if it is less than three years

as it is not registrable. Therefore, the distinction that is postulated by learned counsel for D1 and D2, is without merit. Instead, in my considered view, a transfer is the procedural step following a grant of a lease or tenancy of more than three years. In other words, a transfer is the procedural step taken to register the registrable interest granted.

[79] Turning to the instant case, the fact is that the SPAs are for the sale of parcels with leases of more than three years and they are therefore registrable when the separate strata titles are issued. And, it is a fact that for each and every SPA entered into with two or more persons, the parcels are being held pursuant to an express trust deed declaring themselves to be trustees holding the lease jointly on trust for each other. There is, therefore, no contravention of s. 225(2) of the NLC when the strata title is issued and they are registered as trustees. An exhibit of such a strata title was exhibited (*supra*). For the Ps to assert otherwise is without merit.

Acquiescence And Estoppel

[80] It cannot be gainsaid that it does not lie in the mouths of the Ps to assert that the SPAs are invalid in any event, seeing that they were content to rely upon the SPAs being valid including those with joint purchasers to launch their LAD claims. In this regard, I find the response by D1 and D2 that the Ps should be estopped from raising such a challenge to be well taken. If at all an authority is required, reference can be made to the oft cited Federal Court authority of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 1 MLRA 738; [1995] 3 MLJ 331; [1995] 3 AMR 2871 where Gopal Sri Ram JCA sitting in the Federal Court said:

> A court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interest of justice to do so.

STA And SMA

[81] Finally, the Ps assert that upon the issuance of strata titles, the proprietor shall continue to remain as the parcel proprietor whereas the purchasers (Ps) will not be recognised as a parcel proprietor for purposes of the STA.

[82] This calls for an interpretation of s. 4 of the STA which provides as follows:

> "proprietor" refers to a parcel proprietor, that is to say, a person or body for the time being registered as the proprietor of a parcel, as well as to the proprietor of a provisional block, that is to say, a person or body for the time being registered as the proprietor of a provisional block unless expressly provided otherwise.

[83] Pursuant to the SPAs, it is undeniable and in fact, the Ps made the following concessions (encl. 153 para. 3.31), that:

(i) the purchasers (*albeit,* as lessees) shall assume all obligations of the proprietor as defined in the STA;

(ii) upon issuance of the strata titles:

(a) the purchaser (*albeit,* as lessees) shall be vested with all the powers of a proprietor under the NLC); and

(b) the purchaser (*albeit,* as lessees) shall be vested with all the powers and obligations of a proprietor under the STA;

(iii) the purchasers (*albeit,* as lessees) are to pay the costs and expenses for the maintenance of infrastructure and sinking fund;

(iv) the purchasers (*albeit,* as lessees) are to pay the costs and expenses for the maintenance of infrastructure and sinking fund to the joint management body and management corporation; and

(v) the purchasers (*albeit,* as lessees) are to pay all expenses including quit rent, tax, assessment and other charges.

[84] In my considered view, the word "proprietor" under s. 4 of the STA and which is similar to that used in the SMA, ought to be construed widely to cover the Ps who are undoubtedly proprietors of the leases over their parcels. Construed in this manner, with all of them being given all the rights of a proprietor under the SPAs and with the joint management body having been registered, I find the concerns raised by the Ps to be more apparent than real.

[85] Helpful guidance can be obtained from the SMA which is an act to provide for the proper maintenance and management of buildings and common property and related matters. Her Ladyship Tengku Maimun Tuan Mat CJ speaking for the Federal Court in *Innab Salil v. Verve Suites Mont Kiara Management Corporation* [2020] 10 CLJ 285; [2020] 6 MLRA 244; [2020] 12 MLJ 16; [2020] 7 AMR 861 at para. 26 said:

> [26] *The SMA 2013 is without doubt, a social legislation. It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the SMA 2013 which safeguard community interests ought to receive a liberal interpretation and not a restricted or rigid one.* Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in *Ang Ming Lee* and *Hoh Kiang Ngan.* (emphasis added)

[86] In my considered view, such a liberal interpretation of the term "proprietor" is supported by the definition of the term "purchaser" in the SMA. It is defined to mean "the purchaser of a parcel and includes any person or body who has acquired an interest as a purchaser in the parcel or any person or body for the time being registered as a parcel owner in the register of parcel owners under s. 30(1)". And, the term parcel is defined to mean:

A (a) in relation to a building intended for subdivision, means one of the individual units comprised therein, which (except in the case of an accessory parcel) is to be held under a separate strata title;

(b) in relation to a land intended for subdivision, means one of the individual units of land parcels which is to be held under a separate strata title;

B

(c) in relation to a subdivided building, means one of the individual units comprised therein, which (except in the case of an accessory parcel) is held under a separate strata title; and

(d) in relation to a subdivided land, means one of the individual units of land parcels which is held under a separate strata title.

C

[87] The authority of *Re Bandar Kinrara Properties Sdn Bhd (In Liquidation)* [2021] 6 CLJ 599; [2021] MLJU 423 cited by the Ps does not assist them. This case is authority for the principle that the rights of a purchaser cannot be assigned to a joint management body. It is readily distinguishable as D1 is conferring upon the Ps and not the JMB, their rights as the proprietor.

D

[88] For the Ps to seek to conflate their rights under the SPAs with the rights and obligations under the STA and by extension the SMA is misconceived.

E **Conclusion**

[89] The Federal Court in *Bank Negara Malaysia v. Mohd Ismail* held that where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty summarily if the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'.

F

[90] I would add that this applies to a striking out application where the jurisprudence would be the same and for the other reasons set out below, I have given the parties a bit more indulgence of judicial time to consider their arguments in these two striking out applications:

G

(i) based upon the doctrine of proportionality, I have taken into account the large number of parties in this action and the prospective lengthy amount of time if this action were to go for trial;

H

(ii) the facts are not in dispute;

(iii) the legal points when understood I am satisfied that they are unarguable; and

I (iv) post 1 October 2022, the applicant has only one opportunity to canvass his application for striking out.

[91] Having done so, for the reasons given, I am satisfied that the Ps' action is obviously unsustainable, and the claims frivolous and vexatious. Indeed, with the Ps insisting on wanting to pursue their LAD claims despite the Federal Court decision in *Obata-Ambak*, is an abuse of process.

[92] Wherefore, I have no hesitation in allowing encls. 133 and 135 and I order that the writ and amended statement of claim (2) (encl. 103) against D2 and D1 respectively be struck out. After hearing parties on costs, I order the Ps to jointly and severally pay costs of RM10,000 subject to allocatur to be paid to D1 and RM5,000 subject to allocatur to be paid to D2.